

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>89-11501</u>
PATRICIA CHRISTIAN HAYES	)	
	)	
Debtor	)	
	)	
FIRST NATIONAL BANK OF ATLANTA	)	FILED
	)	at 9 O'clock & 06 min. A.M.
Movant	)	Date: 3-20-90
	)	
vs.	)	
	)	
PATRICIA CHRISTIAN HAYES AND	)	
SYLVIA FORD DRAYTON, TRUSTEE	)	
	)	
Respondents	)	

ORDER

First National Bank of Atlanta ("First Atlanta") the holder of an allowed secured claim seeks modification of the automatic stay established pursuant to 11 U.S.C. 362(a) or in the alternative conversion of this proceeding to a case under Chapter 7. The facts are not in dispute. The debt due First Atlanta is evidenced by two promissory notes executed by the debtor, one dated July 7, 1987, in the original amount financed of Ten Thousand and No/100 (\$10,000.00) Dollars, payable in forty-seven (47) equal monthly installments of Two Hundred Fifty-Seven and 33/100 (\$257.33)

Dollars beginning August 11, 1987, with a final forty-eighth payment in the amount of Two Hundred Fifty-Seven and 57/100 (\$257.57) Dollars due July 11, 1991. The July 7, 1987 note was modified by extension agreement dated April 3, 1989, wherein payments were deferred for sixty (60) days extending the final payment~due date to September 11, 1991. The second note dated January 13, 1989 in the original principal sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars was due and payable in full with all accrued interest on May 13, 1989.

Both notes are secured by the same collateral as evidenced by a secondary deed to secure debt from Patricia C. Hayes to First Atlanta dated February 16, 1988.<sup>1</sup> The property in question is the debtor's residence. In addition to the property described in the deed to secure debt, the loan agreements grant to First Atlanta a security interest in "all balances, deposits and accounts you have or may have with us and collateral, other than your principal dwelling unless specified above, securing other loans with us. . . In addition, our security interests covers all other present and future loans as well as any renewal or extension of this loan and any other loan we make to you." First Atlanta has filed a secured

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<sup>1</sup>Although the first note references the street number as 237 Broad Street and the second note references the street number as 239 I Broad Street, the parties agree that the same property as evidenced I by deed to secure debt dated February 16, 1988 secures both loans.

claim in the net principal sum of Thirty-Five Thousand Three Hundred Forty-Nine and 57/100 (\$35,349.57) Dollars.

The debtor brought this Chapter 13 proceeding on October 3, 1989, and proposed a plan to pay the sum of One Hundred and No/100 (\$100.00) Dollars per month for a period of sixty (60) months. In pertinent part, the plan provides for the debtor to make regular postpetition payments as they become due to First Atlanta as holder of a security interest in debtor's residence with any claim filed for prepetition arrearage on such obligation paid by distributions from the Chapter 13 trustee. At the hearing on the motion of First Atlanta, debtor's counsel acknowledged that the second note due First Atlanta had matured prior to confirmation, and therefore, it was necessary to modify the plan in order to pay that debt due First Atlanta through the Chapter 13 trustee.

First Atlanta contends that a modification of the terms of its security interest is impermissible under the Bankruptcy Code. 11 U.S.C. §1322(b)(2).<sup>2</sup> According to First Atlanta's theory, as its second note matured on May 13, 1989, the total sum due under the

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<sup>2</sup>11 U.S.C. §1322(b)(2) provides in pertinent part:

(b) subject to subsections (a) and (c) of this section the plan may -  
(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .

note of Twenty-Six Thousand Sixty-Three and 83/100 (\$26,063.83) Dollars which includes accrued interest as of that date was due and payable as of the date of the filing of this petition. First Atlanta contends that since the obligation is secured by a security interest in the debtor's principal residence, the terms\of that obligation may not be modified by the debtor's plan and as the debtor is incapable of tendering the full amount due upon confirmation, First Atlanta is entitled to relief from stay pursuant to 11 U.S.C. §362(d)(1)<sup>3</sup> or conversion of this case to a case under Chapter 7 pursuant to 11 U.S.C. §1307(c).<sup>4</sup> First

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<sup>3</sup>11 U.S.C. §362(d)(1) provides in pertinent part

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . .

<sup>4</sup>11 U.S.C. §1307(c) provides in pertinent part

(c) . . . on request of a party in interest or the United States Trustee and after notice and a hearing, the court may convert a case under this Chapter to a case under Chapter 7 of this title, or may dismiss a case under this Chapter, whichever is in the best interests of creditors and the estate, for cause, including -

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and

Atlanta's analysis

ignores the plain language of §1322(b)(2) and its loan documents. Section 1322(b)(2) prevents a debtor from modifying the rights of the holder of a secured claim secured only by a security interest in real property that is the debtor's principal residence. The loans in question were secured not only by the debtor's principal residence, but also by all balance, deposits and accounts the debtor had or may in the future have on deposit with First Atlanta, as well as any other collateral given to secure any other loans with First Atlanta. The creditor accepting a security interest in this additional collateral is no longer protected against modification of its obligation under §1322(b)(2). 5  
Collier on Bankruptcy ¶1322.06 (L. King 15th ed. 1989). In re: Hines, 64 B.R. 684 (Bankr. D. Colo. 1986); In re: Ligon, 97 B.R. 398 (Bankr. N.D. Ill. 1989); In re: Lapp, 66 B.R. 67 (Bankr. D. Colo. 1986). The plain language of section 1322(b)(2) provides that the plan may modify the rights of holders of secured claims.

The balance of First Atlanta's contention deals with

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- charges required under Chapter 123 of Title 28;
- (3) failure to file a plan timely under section 1321 of this title;
- (4) failure to commence making timely payments under section 1326 of this title;
- (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan . . .

feasibility, the ability of the debtor to make all payments under the plan and to comply with the plan as required by 11 U.S.C.

§1325(a)(6). First Atlanta is correct in its position that even if its rights may be modified, the modification may not provide for the extension of payments to First Atlanta beyond sixty (60) months, the maximum allowed period of a plan. See, 11 U.S.C. §1322(C)<sup>5</sup>. According to First Atlanta, if this debtor is allowed to modify its rights and provide for payment of its allowed claim through the Chapter 13 trustee, a payment in excess of Eight Hundred and No/100 (\$800.00) Dollars per month would be required, and such a ,payment is beyond the means of this debtor. The provisions of 11 U.S.C. §1322(b)(5)<sup>6</sup> do not apply to the First Atlanta obligation in that both notes provide for a last payment due date within sixty (60) months. Under the first note the last

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<sup>5</sup>11 U.S.C. §1322(c) provides

(c) The plan may not provide for payments over a period that is longer than three years, unless the court for cause, approves a longer period, but the court may not approve a period that is longer than five years.

<sup>6</sup>11 U.S.C. §1322(b)(5) provides:

(b) . . . the plan may -  
(5) notwithstanding paragraph (2) of this subsection provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

payment is due September 11, 1991. Under the second note the full amount is now due and payable. As it pertains to feasibility, that issue will be addressed at

confirmation, and First Atlanta may object to confirmation on that or any other available basis. In the present posture of this case, there is no evidence that the real property in question is depreciating in value or is uninsured. As it pertains to delinquent property taxes, they are to be paid in full under the plan and the tax commissioner for Richmond County, Georgia has filed a claim. Regarding the first deed to secure debt covering the real property, the plan as presently filed provides for the meeting of postpetition payments as they come due, and there is no evidence of a postpetition default in payments. Currently, the interest of First Atlanta is being adequately protected, and no other for cause basis for the granting of relief from stay appears to be available. Therefore, relief from stay must be denied.

The debtor has proposed a plan of reorganization which the debtor acknowledges must be amended. The debtor should be afforded a reasonable opportunity to put forth a plan of reorganization under the provisions of Chapter 13 in order to repay her debts to the extent possible and financially rehabilitate herself. Conversion to a case under Chapter 7 is premature at this point in this case.

It is therefore ORDERED that motion for relief from stay or in the alternative conversion of this case is denied.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 19th day of March, 1990.